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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities.	)	R.05-04-005
Rulemaking for the Purposes of Revising General Order 96-A Regarding Informal Filings at the Commission.	)	R.98-07-038

REPLY COMMENTS OF SPRINT NEXTEL ON PROPOSED DECISIONS OF COMMISSIONER CHONG

SPRINT NEXTEL

Stephen H. Kukta, Esq.
Kristin L. Jacobson, Esq.
Sprint Nextel
200 Mission Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 572-8358
Facsimile: (415) 278-5303
Email: Stephen.H.Kukta@Sprint.com
Email:Kristin.L.Jacobson@Sprint.com

Earl Nicholas Selby
Law Offices of Earl Nicholas Selby
418 Florence Street
Palo Alto, CA 94301-1705
Telephone: (650) 323-0990
Facsimile: (650) 325-9041
Direct Voicemail: (650) 594-2714
Email: ens@loens.com

Attorneys for Sprint Nextel

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REPLY COMMENTS OF SPRINT NEXTEL ON PROPOSED DECISIONS OF COMMISSIONER CHONG

Introduction

Pursuant to Rule 14.3(d) of the Commission's Rules of Practice and Procedure, Sprint Communications Company, L.P. (U 5112 C), Sprint Telephony PCS, L.P. (U 3064 C), Sprint Spectrum L.P. as agent for Wireless Co., L.P. (U 3062 C) *dba* Sprint PCS, and Nextel of California, Inc. (U 3066 C) (collectively, "Sprint Nextel") respectfully submit these Reply Comments on the July 23, 2007 Proposed Decisions ("PDs") of Commissioner Chong[1] in the above-captioned matters.

Discussion

I. THE COMMISSION SHOULD REQUIRE ILECs TO MAINTAIN A RESALE TARIFF FOR DETARIFFED SERVICES.

In its Comments on the Detariffing PD, Verizon California, Inc. ("Verizon") proposes that incumbent local exchange carriers ("ILECs") should not be required to maintain a resale tariff for detariffed services.[2] Verizon complains that a tariff ". . . would merely duplicate the information regarding retail rates, terms and conditions already provided on carriers' Web sites."[3] The Commission should reject this proposal.

As it explained in its August 13, 2007 Comments on the Detariffing PD, as well as in its March 2 and March 30, 2007 Opening and Reply Comments on special access issues in this proceeding, Sprint Nextel is concerned that ILECs will establish "retail" special access services that, subtly or even blatantly, will discriminate against competitors purchasing functionally identical, but differently named, "resale" special access services. Sprint Nextel is further concerned that, having tariffed a "retail" special access

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[1] The first PD is entitled "Opinion Consolidating Proceedings, Clarifying Rules for Advice Letters under the Uniform Regulatory Framework, and Adopting Procedures for Detariffing" (hereinafter, "Detariffing PD"); the second PD is entitled "Opinion Adopting Telecommunications Industry Rules" (hereinafter, "Industry Rules PD").

[2] *See* "Opening Comments of Verizon California Inc. (U 1002 C) and its Certificated California Affiliates on All Phase 2 Issues Other than Detariffing," *filed* March 2, 2007, at 1- 3.

[3] *See* "Verizon's Opening Comments on the Opinion Adopting Telecommunications Industry Rules," *filed* August 13, 2007, at 2. Sprint Nextel hereby replies to both of Verizon's August 13, 2007 filings.

service, the ILECs will then quickly move to detariff the "retail" offerings. Verizon's new proposal would take this scheme a step further, as it would automatically result, as soon as the "retail" service were detariffed, in the detariffing of the "resale" special access service offering (and in this manner, Verizon's proposal would result in the Commission's never actually ruling on whether "resale" special access should be detariffed). In this backdoor manner, Verizon would indirectly achieve the very goal – namely, detariffing of resale special access services – that Sprint Nextel opposes in this proceeding. If Verizon were to achieve this goal, it would substantially magnify Verizon's power to discriminate in favor of its affiliates and end user customers and against competitors, such as Sprint Nextel, and their end user customers. The Commission should not endorse or facilitate Verizon's anticompetitive scheme.[4]

If "retail" and "resale" special access services were detariffed, it would not only enhance the ILECs' ability, but also exacerbate their propensity to discriminate against competitors purchasing "resale" special access services. This would be especially, and most dangerously, true if ILECs were not required to post, or if they failed to post (as Sprint Nextel fears will occur), *all* of the rates, terms and conditions of *all* of their individual case basis ("ICB") special access contracts with retail customers.[5] In a detariffed marketplace, the Commission's ability to ensure that ILECs posted *all* of the rates, terms and conditions of *all* of their ICB contracts would be, with its present resources, problematic at best.

If, however, the Commission is inclined to adopt Verizon's proposal, which it should not do, then, at a minimum, the Commission should rule that Verizon may not detariff *either* retail *or* resale special access services under any conditions. Such an approach would help the Commission and competitors prevent invidious discrimination by the ILECs in the provision of such services. Such an approach would ensure that competitors could, with assurance, quickly and easily order ILEC special access services from ILEC tariffs. This would also ensure that special access services are actually available to competitors, without the ILEC claiming they had been withdrawn or modified.[6]

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[4] Notably, AT&T California does not envision that, if a retail service were detariffed, it would result in detariffing of its corresponding resale service. *See*, *e.g.*, "Pacific Bell Telephone Company d/b/a AT&T California's (U 1001 C) Comments on Draft Opinion Adopting Telecommunications Industry Rules," *filed* August 13, 2007 ("AT&T Comments") at 7, envisioning the filing of resale service advice letters for detariffed services.

[5] *See* "Comments of the Division of Ratepayer Advocates [("DRA")] on the Proposed Decision of Commissioner Chong (URF Phase II)" ("DRA Comments"), *filed* August 13, 2007, at 9 – 10. DRA correctly notes that, with regard to the requirement that URF Carriers post the rates, terms and conditions of detariffed services on their Web sites, "One apparent loophole exists: the PD does not explicitly require that Individual Case Basis (ICB) offerings must be posted on the URF carrier's Internet site. Thus certain URF carrier rates and service conditions may become invisible, even to the Commission. [¶] Without maintaining some visibility of the prices and terms in ICB contracts, the Commission cannot plausibly guard against discriminatory, anticompetitive or predatory behavior . . . . [T]he PD should [therefore] be modified to require that prices, terms and conditions for *all* service arrangements, including nontariffed ICB contracts, be posted on the URF carriers' Internet sites." *Id.* at 10 (emphasis in original). The Commission should adopt and implement DRA's important recommendations in this regard: the Commission should specify that all ICB contracts must be posted on URF Carriers' Web sites *in their entirety*.

[6] It might seem far-fetched to think that the ILECs would not provide special access services to their competitors if special access services were detariffed. Yet, one only has to consider the ILECs' strategy of replacing copper loops with optical fiber as a means of eliminating CLECs' access to loop facilities to see that ILEC withdrawal of services and facilities from their competitors is not far-fetched at all. *See Petition of the California Association of*

II. THE DETARIFFING PD AND THE INDUSTRY RULES PD SHOULD NOT SOMEHOW BECOME THE OCCASION FOR REVISITING THE "CONSUMER PROTECTION" DECISION, D.06-03-013, AS URGED BY TURN AND DRA.

The Utility Reform Network ("TURN") and DRA apparently view the Detariffing PD and the Industry Rules PD as the occasion for revisiting "consumer protection" issues[7] that, after a five-year process, were finally resolved in D.06-03-013.[8] TURN's recommendations for "specific requirements" in the manner in which carriers post information on their Web sites[9] exemplify the vague and overbroad rules espoused by these parties. TURN, for example, would require "clear and conspicuous" postings "free of *any* sales tactics or marketing jargon"[10] – rules that, because of their vagueness and overbreadth, would again expose carriers to costly and harmful litigation. The Commission correctly rejected such rules in the "consumer protection" decision[11] and should not revisit or reopen these contentious issues in this proceeding.

III. THE COMMISSION SHOULD CLARIFY THAT, FOR SERVICES OUTSIDE THE SCOPE OF D.06-08-030, THE ADVICE LETTER PROCEDURES THAT WERE APPLICABLE PRIOR TO D.06-08-030 WILL CONTINUE TO BE APPLICABLE.

The Detariffing PD and the Industry Rules PD leave an important question open to speculation – namely, for services that were outside the scope of Phase 1 of this proceeding, such as switched access and special access, which "tier" should be used for advice letters addressing such services? AT&T notes the differences between Tier 1, Tier 2 and Tier 3 advice letters and concludes that the Commission should

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Competitive Telecommunications Companies Pursuant to Public Utilities Code Section 1708.5 to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services, P.07-07-009, "Petition of the California Association of Competitive Telecommunications Companies to Establish Rules Governing the Retirement of Copper Loops and Related Facilities," *filed* July 12, 2007. CALTEL's Petition demonstrates that the risk of facilities and services not being available when needed by competitors is very real. As Sprint Nextel observed in its August 13, 2007 Comments on the Detariffing PD and Industry Rules PD, ***"Special access is the lifeblood of the telecommunications industry, touching virtually every communications product."*** *Id.* at 7, n. 19 (emphasis added). Special access is simply too important to the industry for the Commission to allow the ILECs any leeway or possible ability to discriminate against competitors in the provision of this vital service. The temptation for the ILECs to discriminate in favor of their own affiliates would be enormous.

[7] *See*, *e.g.*, DRA Comments at 6, 8 – 9; *see also* "Comments of the Utility Reform Network (TURN) on the Proposed Decision of Commissioner Chong Adopting Procedures for Detariffing and Clarifying Advice Letter Rules," *filed* August 13, 2007 ("TURN Comments"), at 10 – 12.

[8] *Order Instituting Rulemaking on the Commission's Own Motion to establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities*, R.00-02-004 [D.06-03-013] __ CPUC 2d __, 2006 Cal. PUC LEXIS 86, *modified and rehearing denied* [D.06-12-042], __ CPUC 2d __, 2006 Cal. PUC LEXIS 505.

[9] *See* TURN Comments at 11.

[10] *Id.* (emphasis added). Arguably, even posting information about a service, such listing as its price, is a "sales tactic" and the mere act of describing the benefits a service would bring to consumers would constitute "marketing jargon." The absolute last thing the Commission needs to do at this time, *and in this proceeding,* is to return to the fruitless and wasteful effort to regulate carriers' commercial speech – a battle resolved in D.06-03-013.

[11] For example, the Commission should not use the Industry Rules PD as the vehicle for imposing disclosure requirements on commercial mobile radio service ("CMRS") providers (wireless carriers), *see*, *e.g.*, proposed industry rule 5.5, that it did not impose in D.06-03-013. In this regard, Sprint Nextel endorses the comments and analysis in the AT&T Comments at 5-6, proposing an amendment of industry rule 5.5.

clarify whether ". . . it intended to apply the Tier 1 process to flexibly priced services beyond the scope of the URF decision or . . . [whether] the advice letter procedures applicable to those services prior to the URF decision still apply."[12]

The Commission should clarify that the advice letter procedures applicable to services that were outside of Phase 1 of this proceeding, and that were not addressed by the Phase 1 URF decision, D.06-08-030,[13] should continue to apply to such services. Although the Industry Rules PD unequivocally states that, "We have determined in the accompanying URF Phase II decision that Resale Service should continue to be a tariffed service,"[14] it does not state – which it should – that tariff filing rules previously applicable to switched and special access services remain in place and unaffected by the URD decisions. With all of the numerous changes being made in the Commission's regulation of ILECs pursuant to the new URF regime, this is clearly not the time to be according the ILECs the power to modify their switched and special access tariffs through Tier 1 advice letters that would be effective on the date of filing and subject to minimal, if any, staff or carrier review. Given the importance of avoiding ILEC discrimination and price squeezes against competitors, it is crucial that the Commission not only remain vigilant, as it has promised to do, but that Commission staff have the time and opportunity to exercise such vigilance in a meaningful way.

The claim by AT&T that, "Tier 1 treatment would logically apply to those services ["access services and other services beyond the scope of the URF Decision"] as it does to services with pricing flexibility under URF,"[15] is completely misguided. The issue is not one of "logic," but rather an issue of law, of due process, namely, the fundamental requirements of notice and opportunity to be heard. Switched and special access services were clearly not within the scope of Phase 1 of this proceeding,[16] and the Detariffing PD unequivocally states, "We agree with Sprint Nextel that nothing in this decision applies to wholesale or resale tariffs. Wholesale/resale rates are to remain tariffed by URF carriers."[17] Except in the sense that no "tier," other than Tier 3, would be applicable to switched and special access advice letters, nothing in the Industry Rules PD addresses wholesale or resale services. There was no notice that the Commission would consider in this phase whether to apply Tier 1 advice letter filing rules to switched and special access services. Accordingly, the Commission should remove any room for speculation and make it clear that, for services that were outside the scope of D.06-08-030, such as

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[12] AT&T Comments at 5; *see generally id.* at 2 – 5.
[13] *Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities*, R.05-04-005, Opinion [D.06-08-030] (2006) __ CPUC 2d __, 2006 Cal. PUC LEXIS 367 ("D.06-08-030"), *modified and limited rehearing granted and rehearing otherwise denied* [D.06-12-044] (2006) __ CPUC 2d __, 2006 Cal. PUC LEXIS 511
[14] *See* Industry Rules PD at 14.
[15] AT&T Comments at 3.
[16] *See* D.06-08-030 at 258 ("We also clarify that the deregulatory actions taken today do not apply to switched access or to special access. Concerning special access, we recognize the importance of this network interconnection service, and we will address this issue in Phase II in a timely manner.").
[17] *See* Detariffing PD at 62.

switched and special access services, the advice letter procedures that were applicable prior to that decision will continue to be applicable, unless and until otherwise ordered by the Commission.

IV. THE COMMISSION SHOULD DENY AT&T'S REQUEST THAT "CARRIERS AND BUSINESS CUSTOMERS" BE ALLOWED TO "CONTRACTUALLY AGREE TO NOTICE REQUIREMENTS THAT DIFFER FROM THOSE SPECIFIED BY THE COMMISSION" FOR RATE INCREASES AND MORE RESTRICTIVE TERMS AND CONDITIONS.

AT&T requests that "carriers and business customers" be allowed to "contractually agree" to notice other than as required by the Commission (*e.g.*, 30-days' advance notice) for rate increases and imposition of more restrictive terms and conditions.[18] In the abstract, the proposal may seem unobjectionable, but it often is the case that CLECs, IXCs, non-ILEC-affiliated wireless carriers and "business customers" simply do not have bargaining power equal to that of the dominant ILECs – entities that frequently insist on having things their way. Allowing ILECs to "negotiate" a waiver of adequate notice provisions may soon lead the ILECs to "demand" such waivers within the "negotiation" process. Indeed, faced with a complex contract for proposed services, many business customers may not even realize that they are waiving their right to adequate notice. Without adequate notice, many business customers may not even realize such changes are being made. AT&T justifies its proposal by claiming it "makes no sense for the Commission to interfere with the contract negotiating process."[19] However, in order for customers to have a meaningful opportunity to terminate contracts and switch carriers when faced with a rate increase or more restrictive terms and conditions, as Sprint Nextel has agreed they should have,[20] a minimum notice period of 30 days is fair and reasonable and makes good sense. Such provisions will protect all concerned and enhance the potential for development of a competitive marketplace. The Commission should accordingly reject AT&T's proposal.

Conclusion

The Commission should not adopt certain modifications of the Detariffing PD and Industry Rules PD that were proposed by Verizon, TURN, DRA and AT&T, as discussed above. Certain other recommendations of AT&T and Verizon, however, namely, modification of proposed industry rule 5.2 to eliminate unnecessary "archiving" requirements for tariffed and detariffed services, as well as modification of proposed industry rule 5.5 to eliminate requirements improperly made applicable to CMRS providers, should be adopted. The Commission should also adopt DRA's recommendation to close an "apparent loophole" by requiring that all ICB service offerings be posted on URF carriers' Web sites.

[signature page follows]

[18] *See* AT&T Comments at 10 – 11.
[19] *Id.* at 11.
[20] *See* "Comments of Sprint Nextel on Proposed Decisions of Commissioner Chong," *filed* August 13, 2007, at 9.

Respectfully submitted:

SPRINT NEXTEL

/s/ Earl Nicholas Selby

Stephen H. Kukta, Esq.
Kristin L. Jacobson, Esq.
Sprint Nextel
200 Mission Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 572-8358
Facsimile: (415) 278-5303
Email: Stephen.H.Kukta@Sprint.com
Email:Kristin.L.Jacobson@Sprint.com

Earl Nicholas Selby
Law Offices of Earl Nicholas Selby
418 Florence Street
Palo Alto, CA 94301-1705
Telephone: (650) 323-0990
Facsimile: (650) 325-9041
Direct Voicemail: (650) 594-2714
Email: ens@loens.com

Attorneys for Sprint Nextel

Dated: August 20, 2007

Certificate of Service

I, Earl Nicholas Selby, hereby certify that, on August 20, 2007, I caused a copy of the foregoing document, entitled:

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to be served on the parties to R.05-04-005 and R.98-07-038 by electronic mail to the electronic mail addresses and by U.S. Mail to the U.S. Mail addresses on the service list maintained on the Commission's Web site for this proceeding, as indicated on the following pages.

I certify that the above statements are true and correct.

Dated: August 20, 2007 at Palo Alto, CA.

/S/ Earl Nicholas Selby

Electronic Service List, R.05-04-005

hgildea@snavely-king.com
dlee@snavely-king.com
mjoy@aopl.org
kim.logue@qwest.net
Terrance.Spann@hqda.army.mil
simpsco@hqda.army.mil

kevin.saville@frontiercorp.com
kevin.saville@frontiercorp.com
mbrosch@utilitech.net
ann.johnson@verizon.com
robin.blackwood@verizon.com
robbie.ralph@shell.com
anna.sanchou@pactel.com
rex.knowles@xo.com
ed.gieseking@swgas.com
valerie.ontiveroz@swgas.com
nnail@caltel.org
jbloom@winston.com
rdiprimio@valencia.com
don.eachus@verizon.com
jesus.g.roman@verizon.com
michael.backstrom@sce.com
rtanner@scwater.com
pszymanski@sempra.com
esther.northrup@cox.com
ditop@enpnet.com
mmulkey@arrival.com
cmailloux@turn.org
diane_fellman@fpl.com
elaine.duncan@verizon.com
kristin.l.jacobson@sprint.com
mflorio@turn.org
rcosta@turn.org
rudy.reyes@verizon.com
thomas.long@sfgov.org
bnusbaum@turn.org
lgx@cpuc.ca.gov
mlm@cpuc.ca.gov
ndw@cpuc.ca.gov
sjy@cpuc.ca.gov
tad@cpuc.ca.gov
heidi_sieck-williamson@ci.sf.ca.us
steve.bowen@bowenlawgroup.com
ahk4@pge.com
david.discher@att.com
emery.borsodi@att.com
putzi@strangelaw.net
fassil.t.fenikile@att.com

gregory.castle@att.com
gj7927@att.com
jadine.louie@att.com
james.young@att.com
jpc2@pge.com
mwand@mofo.com
michael.sasser@att.com
nedya.campbell@att.com
nelsonya.causby@att.com
strange@strangelaw.net
ppham@mofo.com
stephen.h.kukta@sprint.com
thomas.selhorst@att.com
ashm@telepacific.com
pcasciato@sbcglobal.net
cheryl.hills@icg.com
adl@lrolaw.com
ckomail@pacbell.net
david@simpsonpartners.com
gblack@cwclaw.com
enriqueg@lif.org
jsqueri@goodinmacbride.com
jim@tobinlaw.us
jarmstrong@goodinmacbride.com
smalllecs@cwclaw.com
jwiedman@goodinmacbride.com
mtobias@mlawgroup.com
mschreiber@cwclaw.com
mday@gmssr.com
smalllecs@cwclaw.com
smalllecs@cwclaw.com
deyoung@caltel.org
sleeper@steefel.com
tmacbride@goodinmacbride.com
mmattes@nossaman.com
edwardoneill@dwt.com
suzannetoller@dwt.com
cpuc.contact@realtelephone.net
ens@loens.com
tlmurray@earthlink.net

bgranger@pacbell.mobile.com

mgomez1@bart.gov
douglas.garrett@cox.com
doug_garrett@icgcomm.com
grs@calcable.org
ll@calcable.org
mp@calcable.org
rschmidt@bartlewells.com
robertg@greenlining.org
thaliag@greenlining.org

pucservice@dralegal.org
pucservice@dralegal.org
palle_jensen@sjwater.com

scratty@adelphia.net
cborn@czn.com
jchicoin@czn.com
g.gierczak@surewest.com
cborn@czn.com
abb@eslawfirm.com
chris@cuwcc.org
dhaddock@o1.com
kdavis@o1.com
sheila@wma.org
tom@ucons.com
gregkopta@dwt.com
aisar@millerisar.com
Mike.Romano@Level3.com
kelly.faul@xo.com
william.weber@cbeyond.net
fpc_ca@pacbell.net
katherine.mudge@covad.com
jeff.wirtzfeld@qwest.com
marjorie.herlth@qwest.com
gdiamond@covad.com
astevens@czn.com
athomas@newenergy.com
npedersen@hanmor.com
jdelahanty@telepacific.com
jacque.lopez@verizon.com
douglass@energyattorney.com
case.admin@sce.com
atrial@sempra.com
mshames@ucan.org
clower@earthlink.net
slafond@ci.riverside.ca.us
don@uutlaw.com
jpeck@semprautilities.com
mzafar@semprautilities.com
anna.kapetanakos@att.com
info@tobiaslo.com
ashm@telepacific.com
nlubamersky@telepacific.com
marklegal@sbcglobal.net
vvasquez@pacificresearch.org
judypau@dwt.com
katienelson@dwt.com
tregtremont@dwt.com
ahammond@usc.ed
lex@consumercal.org
lex@consumercal.org
ralf1241a@cs.com

john_gutierrez@cable.comcast.com
jr2136@camail.sbc.com
anitataffrice@earthlink.net
lmb@wblaw.net
sbergum@ddtp.org
tguster@greatoakswater.com
rl@comrl.com
ahanson@o1.com
blaising@braunlegal.com
sheila.harris@integratelecom.com
Adam.Sherr@qwest.com
drp@cpuc.ca.gov
chc@cpuc.ca.gov
chr@cpuc.ca.gov
wit@cpuc.ca.gov
des@cpuc.ca.gov
man@cpuc.ca.gov
dlf@cpuc.ca.gov
fnl@cpuc.ca.gov
flc@cpuc.ca.gov
hmm@cpuc.ca.gov
jar@cpuc.ca.gov
jjs@cpuc.ca.gov
jjw@cpuc.ca.gov
jst@cpuc.ca.gov
jet@cpuc.ca.gov
kar@cpuc.ca.gov
kjb@cpuc.ca.gov
lwt@cpuc.ca.gov
mca@cpuc.ca.gov
mcn@cpuc.ca.gov
nxb@cpuc.ca.gov
pje@cpuc.ca.gov
rff@cpuc.ca.gov
rs1@cpuc.ca.gov
rmp@cpuc.ca.gov
hey@cpuc.ca.gov
kot@cpuc.ca.gov
skw@cpuc.ca.gov
tjs@cpuc.ca.gov
wej@cpuc.ca.gov

Electronic Service List, R.98-07-038

hgildea@snavely-king.com
dlee@snavely-king.com
mjoy@aopl.org
kim.logue@qwest.net
Terrance.Spann@hqda.army.mil
simpsco@hqda.army.mil

kevin.saville@frontiercorp.com
kevin.saville@frontiercorp.com
mbrosch@utilitech.net
ann.johnson@verizon.com
robin.blackwood@verizon.com
robbie.ralph@shell.com
anna.sanchou@pactel.com
rex.knowles@xo.com
ed.gieseking@swgas.com
valerie.ontiveroz@swgas.com
nnail@caltel.org
jbloom@winston.com
rdiprimio@valencia.com
don.eachus@verizon.com
jesus.g.roman@verizon.com
michael.backstrom@sce.com
rtanner@scwater.com
pszymanski@sempra.com
esther.northrup@cox.com
ditop@enpnet.com
mmulkey@arrival.com
cmailloux@turn.org
diane_fellman@fpl.com
elaine.duncan@verizon.com
kristin.l.jacobson@sprint.com
mflorio@turn.org
rcosta@turn.org
rudy.reyes@verizon.com
thomas.long@sfgov.org
bnusbaum@turn.org
lgx@cpuc.ca.gov
mlm@cpuc.ca.gov
ndw@cpuc.ca.gov
sjy@cpuc.ca.gov
tad@cpuc.ca.gov
heidi_sieck-williamson@ci.sf.ca.us
steve.bowen@bowenlawgroup.com
ahk4@pge.com
david.discher@att.com
emery.borsodi@att.com
putzi@strangelaw.net
fassil.t.fenikile@att.com
gregory.castle@att.com
gj7927@att.com
jadine.louie@att.com
james.young@att.com
jpc2@pge.com
mwand@mofo.com
michael.sasser@att.com
nedya.campbell@att.com
nelsonya.causby@att.com

strange@strangelaw.net
ppham@mofo.com
stephen.h.kukta@sprint.com
thomas.selhorst@att.com
ashm@telepacific.com
pcasciato@sbcglobal.net
cheryl.hills@icg.com
adl@lrolaw.com
ckomail@pacbell.net
david@simpsonpartners.com
gblack@cwclaw.com
enriqueg@lif.org
jsqueri@goodinmacbride.com
jim@tobinlaw.us
jarmstrong@goodinmacbride.com
smalllecs@cwclaw.com
jwiedman@goodinmacbride.com
mtobias@mlawgroup.com
mschreiber@cwclaw.com
mday@gmssr.com
smalllecs@cwclaw.com
smalllecs@cwclaw.com
deyoung@caltel.org
sleeper@steefel.com
tmacbride@goodinmacbride.com
mmattes@nossaman.com
edwardoneill@dwt.com
suzannetoller@dwt.com
cpuc.contact@realtelephone.net
ens@loens.com
tlmurray@earthlink.net

bgranger@pacbell.mobile.com

mgomez1@bart.gov
douglas.garrett@cox.com
doug_garrett@icgcomm.com
grs@calcable.org
ll@calcable.org
mp@calcable.org
rschmidt@bartlewells.com
robertg@greenlining.org
thaliag@greenlining.org
pucservice@dralegal.org
pucservice@dralegal.org
palle_jensen@sjwater.com

scratty@adelphia.net
cborn@czn.com
jchicoin@czn.com
g.gierczak@surewest.com
cborn@czn.com

abb@eslawfirm.com
chris@cuwcc.org
dhaddock@o1.com
kdavis@o1.com
sheila@wma.org
tom@ucons.com
gregkopta@dwt.com
aisar@millerisar.com
Mike.Romano@Level3.com
kelly.faul@xo.com
william.weber@cbeyond.net
fpc_ca@pacbell.net
katherine.mudge@covad.com
jeff.wirtzfeld@qwest.com
marjorie.herlth@qwest.com
gdiamond@covad.com
astevens@czn.com
athomas@newenergy.com
npedersen@hanmor.com
jdelahanty@telepacific.com
jacque.lopez@verizon.com
douglass@energyattorney.com
case.admin@sce.com
atrial@sempra.com
mshames@ucan.org
clower@earthlink.net
slafond@ci.riverside.ca.us
don@uutlaw.com
jpeck@semprautilities.com
mzafar@semprautilities.com
anna.kapetanakos@att.com
info@tobiaslo.com
ashm@telepacific.com
nlubamersky@telepacific.com
marklegal@sbcglobal.net
vvasquez@pacificresearch.org
judypau@dwt.com
katienelson@dwt.com
tregtremont@dwt.com
ahammond@usc.ed
lex@consumercal.org
lex@consumercal.org
ralf1241a@cs.com

john_gutierrez@cable.comcast.com
jr2136@camail.sbc.com
anitataffrice@earthlink.net
lmb@wblaw.net
sbergum@ddtp.org
tguster@greatoakswater.com
rl@comrl.com
ahanson@o1.com

blaising@braunlegal.com
sheila.harris@integratelecom.com
Adam.Sherr@qwest.com
drp@cpuc.ca.gov
chc@cpuc.ca.gov
chr@cpuc.ca.gov
wit@cpuc.ca.gov
des@cpuc.ca.gov
man@cpuc.ca.gov
dlf@cpuc.ca.gov
fnl@cpuc.ca.gov
flc@cpuc.ca.gov
hmm@cpuc.ca.gov
jar@cpuc.ca.gov
jjs@cpuc.ca.gov
jjw@cpuc.ca.gov
jst@cpuc.ca.gov
jet@cpuc.ca.gov
kar@cpuc.ca.gov
kjb@cpuc.ca.gov
lwt@cpuc.ca.gov
mca@cpuc.ca.gov
mcn@cpuc.ca.gov
nxb@cpuc.ca.gov
pje@cpuc.ca.gov
rff@cpuc.ca.gov
rs1@cpuc.ca.gov
rmp@cpuc.ca.gov
hey@cpuc.ca.gov
kot@cpuc.ca.gov
skw@cpuc.ca.gov
tjs@cpuc.ca.gov
wej@cpuc.ca.gov

United States Mail Service List, R.98-07-038 and R.05-04-005

Robert A. Smithmidford
Vice President
Bank of America
8011 Villapark Drive
Richmond, VA 23228-2332

Hugh Cowart
Technology & Operations
Bank of America
FL9-400-01-10
9000 Southside Blvd.
Jacksonville, FL 32256

Richard Hairston
R.M. Hairston Company
1112 La Grande Avenue
Napa, CA 94558-2168

Dorothy Connell
Director
AirTouch Communications, Inc.
2999 Oak Rd. 5
Walnut Creek, CA 94597-2066

Richard Balocco
President
California Water Association
374 W. Santa Clara Street
San Jose, CA 95196

Lou Filipovich
15376 Laverne Drive
San Leandro, CA 94579

ALJ Steven Kotz
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Jane Whang, Esq.
Advisor to Commissioner Chong
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102